

Supreme Court, U. S.

F I L E D

DEC 1 1976

MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

October Term, 1976

**No. 76-471**

THE PEOPLE OF THE STATE OF NEW YORK,

*Petitioner,*

*v.*

ANTHONY CONSOLAZIO,

*Respondent.*

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## PETITIONER'S REPLY BRIEF

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DENIS DILLON

District Attorney, Nassau County

*Attorney for Petitioner*

262 Old Country Road

Mineola, New York 11501

(516) 535-4800

WILLIAM C. DONNINO

ANTHONY J. GIRESE

Assistant District Attorneys

*Of Counsel*

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**PETITIONER'S REPLY BRIEF**

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**Preliminary Statement**

This brief is submitted in reply to respondent Anthony Consolazio's brief in opposition to the petition for certiorari. It contains petitioner's reply to the second portion of Consolazio's argument, wherein he alleges that no actual case or controversy is presented by the petition for certiorari.

## ARGUMENT

### The instant case constitutes a justifiable case.

In reply to the petition for certiorari, respondent Anthony Consolazio claims, *inter alia*, that no "actual case or controversy is presented" in the instant case, and thereby seeks a denial of the petition pursuant to Article III, §2, clause 1 of the Constitution of the United States and 28 U.S.C. §2201.

The sole factual support for this claim presented by respondent consists of a letter (respondent's Appendix "A," brief, p. 14). The document in question was written by an assistant district attorney on April 30, 1975, at a time when a Judge of the New York Court of Appeals was considering whether to grant leave to appeal the case to that court.

[Consolazio was tried for obtaining money from some 39 victims by means of a confidence scheme. At trial, he was convicted of obtaining money from certain of those victims; counts charging him with obtaining money from certain others were dismissed at the conclusion of the People's case by *nisi prius*. Both parties cross-appealed to the Appellate Division, Second Judicial Department. That court affirmed the conviction and reinstated the dismissed counts, ordering a retrial as to them. Consolazio then sought leave to appeal to the Court of Appeals to obtain a reversal of both the affirmed judgment of conviction and the order reinstating the dismissed counts.]

The letter to Judge Fuchsberg indicates that the District Attorney's Office had agreed not to pursue any further action against Consolazio with respect to the reinstated counts. The context of the letter, as indicated therein, was a discussion had in the Judge's chambers in which the question of whether or not leave to appeal to the Court of Appeals should be granted. As respondent Consolazio himself recognizes, the letter was written at a time when "petitioner clearly anticipated that leave to appeal to the New York Court of Appeals would be denied" (brief, p. 11). Thus, by means of the letter, petitioner decided that it was then in its best interest to forego a "test case" on the Double Jeopardy issue\* that would at the same time place in issue the judgment of conviction on not insubstantial questions of state law. Leave to appeal, however, was granted. At Consolazio's insistence the die was cast on both issues and petitioner's offer to "settle" the litigation rejected. It therefore mocks fundamental fairness for Consolazio to suggest that he can have the benefit of a potential non-prosecution were Judge Fuchsberg to have denied; and when, however, that review is granted and Consolazio succeeds on the merits of the Double Jeopardy issue in the Court of Appeals, still interpose petitioner's unaccepted offer of grace as a bar to all further prosecution. Cf. *Santobello v. New York*, 404 U.S. 260 (1971). It should also be noted that respondent can hardly be said to have "relied" on this obviously limited representation in any way, for in the Court of Appeals he not only failed to claim that the Double Jeopardy issue was moot by virtue of the letter, but he made arguments attacking the reinstatement of those

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\* The letter expressly indicated that it was not to be taken as an indication of petitioner's view of the merits of the Double Jeopardy issue.

counts grounded in both double jeopardy and the underlying merits of the trial court's dismissal.

Finally, under New York law, Consolazio, if convicted and sentenced for the crimes now at issue, could receive sentences consecutive to those which he is presently serving upon the crimes for which he was convicted by the fact-finder. N.Y. Penal Law §70.25. And, even if any new sentences were to run concurrently, Consolazio, who has already commenced serving his sentence upon the crimes for which he was convicted, could *in actuo*, through New York's method for calculating concurrent sentences, be required to serve a further period of incarceration. N.Y. Penal Law §70.30(1)(a). And even were no additional time to be served, the mere possibility of collateral consequences to Consolazio attendant upon further convictions itself prevents a sufficient "impact of actuality" to render the case justifiable. *Benton v. Maryland*, 395 U.S. 789 (1969). See also *Anno.*, 40 L.Ed.2d 783, 817, and cases cited therein.

### Conclusion

*The petition presents a justifiable case. For the reasons set forth in the original petition, certiorari should be granted.*

Respectfully submitted,

DENNIS DILLON  
District Attorney  
County of Nassau

WILLIAM C. DONNINO  
ANTHONY J. GIBBSE  
Assistant District Attorneys  
Of Counsel

November, 1976